92-956

No. 92 -

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

THE CITY OF NEW YORK,

Petitioner,

- against -

JAMES WALKER,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Decision of the United States Court of Appeals
for the Second Circuit, Dated September 4, 1992

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1783--August Term 1991

(Argued June 26, 1992

Decided September 4, 1992)

Docket No. 92-7365

JAMES WALKER,

Plaintiff-Appellant,

- v. -

THE CITY OF NEW YORK,

Defendant-Appellee.

Before:

NEWMAN, PRATT, and WALKER,
Circuit Judges.

Appeal from order entered in the United States District Court for the Southern District of New York, John S. Martin, Jr. Judge, dismissing plaintiff's § 1983 suit for failure to state a claim upon which relief can be granted.

Reversed and remanded.

DOUGLAS S. LIEBHAFSKY (Claire D. Chapell, Wachtell, Lipton, Rosen, & Katz, of counsel) for Plaintiff-Appellant.

A. ORLI SPANIER (O. Peter Sherwood, Corporation Counsel, New York, NY Ellen B. Fishman, David Lock, of counsel) for Defendant-Appellee.

WALKER, Circuit Judge:

Plaintiff James Walker spent nineteen years in prison for a crime that it now appears he did not commit. In 1971 police officers and prosecutors covered up exculpatory evidence and committed perjury in order to insure Walker's conviction despite their knowledge of Walker's probable innocence. After unearthing facts critically undermining the state's case against him, Walker won his release from

prison in 1990. Walker then filed suit under 42 U.S.C. § 1983 against the City of New York in the United States District Court for the Southern District of New York, seeking eleven million dollars. The district court dismissed the suit for failing to state a claim upon which relief can be granted.

The question presented to us on appeal is whether a plaintiff who alleges that he has been falsely imprisoned for nineteen years has a claim for relief under § 1983 against the city that hired but allegedly failed adequately to train and supervise the police officers and prosecutors who conspired against him. When stated this way, the question seems to admit of only one answer. However, beneath the obvious equities of this case lie complex and difficult questions of federal law.

On June 1, 1970, William Powell and at least one accomplice robbed an armored truck. Powell murdered the truck's driver, Edward Kargman, while an accomplice struck a guard, Jose Ruiz, with a sawed-off shotgun, knocking him unconscious. William Powell pled guilty to felony murder in October 1971.

The police were unable to identify, much less find, Powell's accomplice until several months after the incident, when John Snider, a drug addict with a substantial criminal record, identified James Walker as the man who assaulted Jose Ruiz. Snider also told the police that Melvin Givens, a friend of Walker, had participated in the crime. Snider

was previously acquainted with Givens and knew Walker to be Givens' friend.

On April 23, 1971 Detective Robert Powell ("Detective Powell"), the police officer in charge of the investigation, arrested Walker. After the arrest, Walker took part in a police lineup. At the lineup, Jose Ruiz failed to pick out Walker and instead identified another man (apparently a police officer) as his assailant. The investigation suffered a second setback when Detective Powell and Kings County Assistant District Attorney (ADA) J. Paul Zsuffa, the lead prosecutor on the case, learned that Melvin Givens had been in prison on June 1, 1970, the date of the heist. Thus, contrary to Snider's statement, Givens could not possibly have participated in the crime.

Undeterred, ADA Zsffa and Detective Powell decided to continue efforts to prosecute Walker. In June 1971, Snider testified before a grand jury, implicated Walker, and made no mention of Givens. The grand jury indicted Walker.

Although the prosecution possessed documents revealing both Snider's prior false statements and Ruiz's failure to identify Walker, no such documents nor any record of either incident was ever turned over to the defense. Instead, in a pre-trial Wade hearing, ADA Zsuffa appeared as a witness and denied that the April 23 lineup had taken place. At the same hearing, Detective Powell claimed that he could not recall the lineup. At trial, Snider testified against Walker without mentioning Givens and

Detective Powell testified to the consistency between Snider's statements after the incident and at trial, despite the glaring discrepancy between them.

On October 19, 1971 a jury convicted Walker of murder. In April 1972, the court sentenced Walker to a term of twenty years to life imprisonment. Years later, Walker learned of the exculpatory evidence concealed in this case. On January 2, 1990 Walker moved in state court for an order vacating his conviction. With the consent of the Kings County District Attorney's office, the court entered an order dismissing the indictment, with prejudice, and vacating the conviction.

After winning his release, Walker sued New York City (the City) under 42 U.S.C. § 1983, alleging that the City had failed adequately to train and supervise the police and the district attorney's office. Specifically, Walker asserted that the City should have trained police officers and ADAs not to commit or suborn perjury and not to suppress exculpatory evidence. Walker asserted that the City's failure to train constituted deliberate indifference to his constitutional rights and proximately caused his wrongful imprisonment.

On the City's motion, the district court dismissed Walker's complaint. The district court reasoned that failure to train and supervise City employees can only constitute deliberate indifference by the City where it should be obvious to City policymakers that training and supervision is required. The district court concluded that there was no

obvious need to train prosecutors and police officers not to commit or suborn perjury, since that should be clear to all without training. Similarly, the district court found that the prosecutor's duty to turn over exculpatory material to the defense was sufficiently obvious as not to require training. Finally, the district court concluded that whether or not it was obvious that police officers should turn over exculpatory evidence, any failure to train in this regard did not proximately cause Walker's injuries, since the police did turn over the exculpatory evidence to the prosecution and only the prosecutor had a duty to turn the evidence over to the defense. Accordingly, the district court dismissed Walker's complaint. This appeal followed.

II

This appeal requires us to address a basic question of section 1983 litigation: when are municipalities liable for the unconstitutional acts of municipal employees? Until 1978, the answer to that question was simple--never. See Monroe v. Pape, 365 U.S. 167, 187 (1961). In Monell v. New York City Dept. of Social Services, 436 U.S. 658 (1978), the Supreme Court overruled Monroe and declared that Congress had not intended to exempt municipalities from liability in all cases. The Monell court also concluded that Congress had not intended to expose municipalities to respondeat superior liability for all misdeeds by municipal employees. Rather, it is only when the municipality itself commits the misdeed, that is, "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be

said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." Monell, 436 U.S. at 694.

Monell raised several elusive questions. What is a government policy or custom? Who is a policymaker Can a single incident constitute an unlawful policy? In developing answers to these questions, the Supreme Court has been mindful of maintaining a delicate balance between insuring that municipalities are liable for their own misdeeds and avoiding respondeat superior liability. See St.Louis v. Praprotnik, 485 U.S. 112, 131 (1988) (opinion of O'Connor, J.); Pembaur v. Cincinnati, 475 U.S. 469, 477 (1986); Oklahoma City v. Tuttle, 471 U.S. 808, 830 (1985) (opinion of Brennan, J.).

In Oklahoma City v. Tuttle, 471 U.S. 808 (1985), the Court considered whether evidence of a single incident of use of excessive force by the police could, without more, establish a municipal policy of failing to properly train and supervise police officers. The Court concluded that to allow evidence of a single incident to establish inadequate training, without any proof relating to the nature of the training itself, would "unduly threaten [a municipality's] immunity from respondeat superior liability." Id. at 830 (opinion of Brennan, J.). Instead, to establish inadequate training, plaintiffs must put forward some evidence that the City itself has acted or consciously not acted. Id. at 832 (opinion of Brennan, J.).

In Pembaur v. Cincinnati, 475 U.S. 469 (1986), the Court clarified that Tuttle should not be taken to mean that a single act could never be the basis of municipal liability. So long as the single challenged act was the decision of a municipal policymaker, the municipality could be held liable. Id. at 480. The Pembaur court fractured, however, on the precise definition of a policymaker for § 1983 purposes. A plurality of the Court suggested that a policymaker was one who, under state law, "possesses final authority to establish municipal policy with respect to the action ordered." Id. at 481 (opinion of Brennan, J.). Two concurring justices questioned whether this definition was too broad. See id. at 486 (White, J. concurring); id. at 491 (O'Connor, J. concurring).

The Court revisited the policymaker question in St. Louis v. Praprotnik, 485 U.S. 112 (1988). There, the Court affirmed that state law provides a proper source for assessing who possesses final authority to establish municipal policy. Id. at 124 ("the identification of policymaking officials is a question of state law") (opinion of O'Connor, J.); id. at 143 ("state law will naturally be the appropriate starting point") (Brennan, J. concurring). A plurality suggested that where the municipal policymaker delegated some discretion to subordinates, the city could be liable only for the policymaker's delegation and supervision, not the subordinate's exercise of authority. The plurality noted, however, that "[i]f the authorized policymakers approve a subordinate's decision and the basis for it, their ratification would be chargeable to the municipality because

their decision is final." Id. at 127 (opinion of O'Connor, J.).

In sum, Tuttle and Pembaur require plaintiffs to allege actual conduct by a municipal policymaker. Praprotnik insures that only actions by officials relatively high up in the municipal hierarchy will produce municipal liability. The combination of the three cases necessarily molds many § 1983 claims against municipalities into "failure to train" or "failure to supervise" claims. It is only by casting claims in this way that plaintiffs can link an actual decision by a high level municipal official to the challenged incident.

In City of Canton v. Harris, 489 U.S. 378 (1989), the Court addressed the dimensions of municipal liability for failure to train or supervise. Harris sued Canton alleging that the city had failed to adequately train its police as to when to summon medical care for an injured detainee. The Supreme Court ruled that a claim of inadequate training will trigger municipal liability only where "the failure to train amounts to deliberate indifference to the rights" of those with whom municipal employees will come into contact. Id. at 388.

The Court explained that "deliberate indifference" required that city policymakers made a "deliberate choice ... from among various alternatives" not to fully train employees. Id. at 389. Such a deliberate choice could be shown where "in light of the duties assigned to specific officers or employees the need for more or different

training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need." Id.

The Court offered as an example of deliberate indifference a municipality's failure to train police officers on the proper use of deadly force. The Court noted that "city policymakers know to a moral certainty that their police officers will be required to arrest fleeing felons." Id. at 390n. 10. Moreover, "[t]he city has armed its officers with firearms, in part to accomplish this task." Id. In such a situation, "the need to train officers in the constitutional limitations on the use of deadly force ... can be said to be 'so obvious' that failure to do so would properly be characterized as 'deliberate indifference' to constitutional rights." Id.

Even where the need to train or supervise would not be obvious to a stranger to the situation, a particular context might make the need for training or supervision so obvious that a failure to do so would constitute deliberate indifference. Thus, the Court suggested that "[i]t could also be that the police, in exercising their discretion, so often violate constitutional rights that the need for further training must have been plainly obvious to the city policymakers, who, nevertheless, are 'deliberately indifferent' to the need." Id.

From these examples, we discern three requirements that must be met before a municipality's failure to train or

supervise constitutes deliberate indifference to the constitutional rights of citizens. First, the plaintiff must show that policymaker knows "to a moral certainty" that her employees will confront a given situation. Id. Thus, a policymaker does not exhibit deliberate indifference by failing to train employees for rare or unforeseen events.

Second, the plaintiff must show that the situation either presents the employee with a difficult choice of the sort that training or supervision will make less difficult or that there is history of employees mishandling the situation. Whether to use deadly force in apprehending a fleeing suspect qualifies as a "difficult choice" because more than the application of common sense is required. Instead, police officers must adhere to the rule of Tennessee v. Garner, 471 U.S. 1 (1985), that deadly force may constitutionally be applied to a fleeing suspect only when "the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm" and when "where possible, some warning has been given." Id. at 11-12. A choice might also be difficult where, although the proper course is clear, the employee has powerful incentives to make the wrong choice.

Finally, the plaintiff must show that the wrong choice by the city employee will frequently cause the deprivation of a citizen's constitutional rights. City of Canton, 489 U.S. at 390. Thus, municipal policymakers may appropriately concentrate training and supervision resources

on those situations where employee misconduct is likely to deprive citizens of constitutional rights.

Where the plaintiff establishes all three elements, then we think it can be said with confidence that the policymaker should have known that inadequate training or supervision was "so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need." Id. With these principles in mind, we examine Walker's complaint to discern whether it states a claim upon which relief can be granted.

III

In reviewing a motion to dismiss on the pleadings, "the factual allegations in the complaint must be accepted as true, and all reasonable inferences must be drawn in favor of the plaintiff." Frazier v. Coughlin, 850 F.2d 129, 129 (2d Cir. 1988). The district court should grant such a motion only if, after viewing plaintiff's allegations in this favorable light, "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Ricciuti v. New York City Transit Authority, 941 F.2d 119 (2d Cir. 1991).

Plaintiff's complaint makes the following allegations. First, Walker alleges that the district attorney's office failed to adequately train and supervise ADAs with respect to the obligation to turn over exculpatory evidence and to avoid the introduction of perjured evidence. Second, Walker

asserts that the police department failed to adequately train and supervise officers as to the proper handling of exculpatory information and the duty to provide (and seek) truthful and accurate testimony. Walker also suggests that police and ADAs were not trained about a host of more general obligations. Distilled in light of the facts of this case, each of these more general allegations effectively restates the allegations listed above. We will consider these allegations in turn to determine whether any states a claim upon which relief can be granted.

A. Claims against the police department.

Walker alleges that the police department failed to train and supervise police officers in two areas--the obligation not to commit or suborn perjury, and the duty to turn over exculpatory evidence. The district court found that neither allegation stated a claim upon which relief could be granted. With respect to the exculpatory evidence, the district court concluded, on the facts alleged in the complaint, that the police had fully complied with their constitutional obligations by turning over exculpatory evidence to the prosecutors. With respect to the perjury charge, the district court found that any failure to train did not constitute deliberate indifference, since "[a]ny reasonable police officer or lay person would be expected to know this without training."

1. Exculpatory evidence.

Walker alleges that the police department had no policy on the proper handling of the exculpatory evidence. If true, this might, in the proper case, provide the basis for a deliberate indifference claim under the standards laid out above. On the facts alleged here, however, it is clear that any failure to train or supervise the police as to the handling of exculpatory evidence did not cause Walker's injury.

Walker alleges that Detective Powell conspired with ADA Zsuffa to suppress exculpatory evidence and to elicit perjured testimony. Walker does not allege, however, that Detective Powell or any other police officer concealed any exculpatory evidence from the prosecution team. Thus, in order for the police department's failure to train to have any causal connection to Walker's injury, it must be the case that police officers have an obligation with respect to exculpatory evidence beyond disclosing that evidence to the prosecutor. We do not believe that such an obligation exists.

The constitutional duty to disclose exculpatory evidence to the defense has its roots in Brady v. Maryland, 373 U.S. 83 (1963). In Brady, the Court held that "the suppression by the prosection of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Brady does not discuss the relative disclosure obligations of police and prosecutor.

Subsequent cases, however, have suggested that the police satisfy their obligations under Brady when they turn exculpatory evidence over to the prosecutors. See Campbell v. Maine, 632 F.Supp. 111, 121 (D. Me. 1985), aff'd, 787 F.2d 776 (1st Cir. 1986); Hauptmann v. Wilentz, 570 F. Supp. 351, 389 (D.N.J. 1983), aff'd, 770 F.2d 1070 (3d Cir. 1985), cert. denied, 474 U.S. 1103 (1986). But see Hilliard v. Williams, 516 F.2d 1344 (6th Cir. 1975), vac'd on other grounds, 424 U.S. 961 (1976). We agree. It is appropriate that the prosecutors, who possess the requisite legal acumen, be charged with the task of determining which evidence constitutes Brady material that must be disclosed to the defense. A rule requiring the police to make separate, often difficult, and perhaps conflicting, disclosure decisions would create unnecessary confusion. It also would ignore the fact that the defendant's appropriate point of contact with the government during litigation is the prosecutor and not those who will be witnesses against him. Since Walker has alleged that the police shared all exculpatory evidence with the prosecutors, Walker's claim against the police relating to the suppression of exculpatory evidence fails to state a claim upon which relief can be granted. We affirm the district court's dismissal of this element of Walker's complaint.

Walker contends, however, that we should not read his allegations so strictly. He points out that, contrary to his allegations, discovery may reveal that the police did suppress evidence from the prosecution. This is not really an objection to the dismissal of this portion of the complaint, as pled. Rather, Walker is asserting a right to

replead the complaint in the event later discovery yields new evidence contradicting his pleadings. We think such a request to replead should properly be addressed to the district court on remand as circumstances may warrant.

2. Perjury.

Walker also contends that the police department had an obligation to train and supervise officers not to commit perjury or aid in the prosecution of the innocent. The district court rejected these claims on the theory that the police officer's obligation not to commit or suborn perjury or prosecute the innocent are obvious.

Walker contends that his allegations meet the deliberate indifference threshold set by City of Canton. That is, city policymakers know to a moral certainty that police officers will be presented with opportunities to commit perjury or proceed against the innocent. Moreover, a failure by police officers to resist these opportunities will almost certainly result in deprivations of constitutional rights. Accordingly, Walker contends, that just as municipalities have a duty to train officers in the constitutional limits on the use of force in apprehending criminals, so too must municipalities train and supervise their officers with respect to the obligation not to commit perjury or assist in the prosecution of the innocent.

Walker's argument misses a crucial step. It is not enough to show that a situation will arise and that taking the wrong course in that situation will result in injuries to

citizens. As laid out above, City of Canton also requires a likelihood that the failure to train or supervise will result in the officer making the wrong decision. Where the proper response--to follow one's oath, not to commit the crime of perjury, and to avoid prosecuting the innocent--is obvious to all without training or supervision, then the failure to train or supervise is generally not "so likely" to produce a wrong decision as to support an inference of deliberate indifference by city policymakers to the need to train or supervise.

That general rule, however, does not apply in every case. While it is reasonable for city policymakers to assume their employees possess common sense, where there is a history of conduct rendering this assumption untenable, city policymakers may display deliberate indifference by doing so. If Walker can produce some evidence that policymakers were aware of a pattern of perjury by police officers but failed to institute appropriate training or supervision, his claim can survive summary judgment.

Walker has not expressly alleged a history of police perjury. Nonetheless, it does not appear "beyond doubt" that Walker cannot prove this "set of facts in support of his claim which would entitle him to relief." Ricciuti v. New York City Transit Authority, 941 F.2d 119 (2d Cir. 1991). Walker should be allowed to pursue discovery in order to determine whether there was a practice of condoning perjury (evidenced perhaps by a failure to discipline for perjury) or a pattern of police misconduct sufficient to require the police department to train and supervise police

officers to assure they tell the truth. Accordingly, we reverse the district court's dismissal of Walker's claims alleging the city's deliberate indifference to the need to train and supervise the police not to commit perjury or assist in the conviction of the innocent.

B. Claims against the District Attorney's Office.

Walker assails the District Attorney's office's lack of training and supervision relating to ADAs' obligations to disclose exculpatory evidence and to avoid the use of perjured evidence. The district court concluded that Walker had failed to state a claim against the municipality, since each obligation should have been obvious without training. With respect to the use of perjured evidence, we disagree with the district court for the reasons set out above in the discussion of the police training claim. We also disagree with the district court's determination that a prosecutor's obligations under Brady are so obvious as to require no training.

Reading Walker's complaint in a light most favorable to Walker, we conclude that a complete failure by the DA in 1971 to train ADAs on fulfilling Brady obligations could constitute deliberate indifference sufficient to give rise to § 1983 municipal liability. First, the district attorney knows to a moral certainty that ADAs will acquire Brady material. Second, contrary to the district court, we do not think that in 1971, just seven years after Brady was decided, that the Brady standard was so obvious or easy to

apply as to require, as a matter of law, no training or supervision.

Indeed, the evidence withheld in this case, though clearly Brady material, was not of the sort that one would obviously turn over, absent some knowledge of Brady. That is, there might have been no need in 1971 to train ADAs to disclose direct evidence that the accused was elsewhere at the time of the crime. But, it might not have been obvious in 1971 that ADAs should turn over all information of the sort at issue here--evidence impeaching the accusing witness or revealing a lineup misidentification but not directly establishing the innocence of the accused. Because the proper course of conduct was not at all obvious in 1971 absent some training in the intricacies of Brady, a jury could find that the complete failure to train or supervise alleged here would likely result in ADAs making the wrong choices about turning over this kind of Brady material. We express no view as to whether such a jury finding would be supportable in other time periods or with respect to other kinds of exculpatory evidence. Finally, withholding Brady material will virtually always lead to a substantial violation of constitutional rights. We think Walker has adequately alleged deliberate indifference by the district attorney.

IV

Having determined that Walker has properly alleged deliberate indifference by the district attorney, the question remains whether or not the district attorney is a municipal

policymaker. The City contends that the district attorney is a state official, and therefore that his deliberate indifference cannot trigger municipal liability.

The City finds some support for its view in Baez v. Hennessy, 853 F.2d 73 (2d Cir. 1988), cert. denied, 488 U.S. 1014 (1989). There, plaintiff brought a § 1983 suit seeking to hold the County of Onondaga liable for an ADA's attempt to prosecute the plaintiff after a grand jury declined to return an indictment. We held that "when prosecuting a criminal matter, a district attorney in New York State, acting in a quasi-judicial capacity, represents the State, not the county." Id. at 77. Accordingly, we ruled that a district attorney's misconduct in prosecuting an individual could not give rise to municipal liability. Baez, however, involved a challenge to the decision by an ADA to prosecute an individual and the district attorney's endorsement of that decision. Here, by contrast, Walker is challenging the district attorney's management of the office--in particular the decision not to supervise or train ADAs on Brady and perjury issues.

In Gentile v. County of Suffolk, 926 F.2d 142 (2d Cir. 1991), we held that a county could be held liable for a county district attorney's long practice of ignoring evidence of police misconduct and sanctioning and covering up wrongdoing. In Gentile, we confined Baez to challenges to "specific decision[s] of the District Attorney to prosecute." Id. at 152n.5. We think Gentile, not Baez, controls here. Where a district attorney acts as the manager of the district attorney's office, the district attorney acts as a county policymaker.

There is an added complexity in this case because Walker is suing the City of New York, not Kings County. It is possible that an official could be a policymaker for one of New York City's constituent counties without being a policymaker for the City. However, Walker alleged, and the City conceded below, that the county district attorneys within the City have final, discretionary authority to implement training and supervision within their own office. Since the City has conceded that no City official has veto authority over training or supervision decisions by the county district attorney, we hold that the Kings County District Attorney acted as a municipal policymaker in this case. See Pembaur, 475 U.S. at 481-85 (opinion of Brennan, J.). Accordingly, Walker's allegations of deliberate indifference by the District Attorney provide a proper basis for holding the City liable.

Conclusion

The Supreme Court has made clear that § 1983 does not subject municipalities to liability whenever municipal employees go astray. It is only when the municipality itself wreaks injury on its citizens that municipal liability is appropriate. Here, plaintiff Walker has catalogued a host of misdeeds by city employees that led to his wrongful imprisonment. Some of these misdeeds relate to such basic norms of human conduct--the duty not to lie or persecute the innocent--that in the ordinary case a municipal policymaker need not expend precious resources on training or supervision but can instead rely on the common sense of her employees. However, in this case discovery may reveal

a pattern of misconduct sufficient to turn such apparently reasonable reliance into deliberate indifference. In that event, liability may fairly be laid at the City's doorstep. Even absent such evidence, we think that Walker has properly alleged that a particular municipal action--the failure to train and supervise prosecutors to insure that they meet their constitutional obligation to turn over exculpatory material to the defense--caused his injuries. Accordingly, we conclude that the district court erred in dismissing Walker's complaint. We reverse and remand for further proceedings consistent with this opinion.

Reversed and remanded.

Order and Judgment of the United States Court of Appeals for the Second Circuit, Entered September 4, 1992

United States Court of Appeals
FOR THE
SECOND CIRCUIT

SDNY
91-cv-2327
MARTIN

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 4th day of September, one thousand nine hundred and ninety-two.

PRESENT: HON. JON O. NEWMAN
HON. GEORGE C. PRATT
HON. JOHN M. WALKER, JR.

Circuit Judges,

JAMES WALKER,

92-7365

Plaintiff-Appellant,

- v -

THE CITY OF NEW YORK,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby **ORDERED, ADJUDGED** and **DECREED** that the order of said district court is reversed and the actin be and it hereby is remanded to that said district court for further proceedings in accordance with the opinion of this court with costs to be taxed against the appellee.

ELAINE B. GOLDSMITH, Clerk
By:

Edward J. Guardaro
Staff Attorney

Memorandum Order and Opinion of the United States District Court for the Southern District of New York, Dated January 7, 1992

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

JAMES WALKER,

Plaintiff,

- against -

THE CITY OF NEW YORK,

Defendant.

----------x

91 Civ. 2327 (JSM)

MEMORANDUM ORDER AND OPINION

JOHN S. MARTIN, JR., District Judge:

Plaintiff served 19 years in jail as a result of a conviction which was ultimately set aside after plaintiff obtained exculpatory evidence which he alleges was knowingly suppressed by the prosecution. Accepting the allegations of the complaint as true, plaintiff is someone for whom the law should provide a remedy. Unfortunately for plaintiff, however, the injury which he suffered is not one for which he is entitled to redress against this defendant, The City of New York, pursuant to 42 U.S.C. § 1983. For

that reason, the motion of The City of New York to dismiss the complaint is granted.

The complaint alleges that the plaintiff was prosecuted and convicted in proceedings that were tainted throughout by the suppression of exculpatory evidence by police officers and a prosecutor, by the knowing use of perjured testimony, including false testimony of police officers in the grand jury and in pretrial proceedings. All those allegations make out a cause of action under 42 U.S.C. § 1983 against the individual parties. They are not named as individual defendants in the action before the Court. The only defendant in this complaint is the City of New York ("the City").

Plaintiff attempts to make out a claim against the City by general allegations throughout the complaint that both the Police Department and the Office of the District Attorney of Kings County failed to appropriately train and instruct their personnel and lacked policies and procedures concerning such things as the prosecutor's duty to disclose exculpatory material and to avoid the introduction of perjured testimony.

In Monell v. Department of Social Services, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978), the Supreme Court held that a municipality could be found liable for the deprivation of constitutional rights. A municipality, however, is not responsible under the doctrine of respondeat superior for the acts of its employees acting within the scope their authority, but rather the municipality itself must inflict the injury to incur liability. City of Canton v. Harris, 489 U.S. 378, 385, 109 S. Ct. 1197, 1203 (1989). A city only is responsible when its municipal

policy causes the constitutional violation. Monell, 436 U.S. at 694; 98 S. Ct. at 2037-38.

The Supreme Court in City of Canton v. Harris, 489 U.S. 378, 109 S. Ct. 1197 (1989), clarified that inaction as well as action by a municipality could result in municipal liability under Section 1983. The Court ruled that in some instances a city's failure to adequately train its employees could constitute municipal policy and subject the city to a Section 1983 action. City of Canton, 489 U.S. at 387, 109 S. Ct. at 1204. However, a lack of training only rises to this level if "the city's failure to train amounts to deliberate indifference to the constitutional rights of its inhabitants." City of Canton, 489 U.S. at 392, 109 S. Ct. at 1206. A city exhibits "deliberate indifference" when the need for training is "obvious" or when, although "the need for training may not be obvious from the outset, . . . a pattern of constitutional violations could put the municipality on notice that its officers confront the particular situation on a regular basis, and that they often react in a manner contrary to constitutional requirements." City of Canton, 489 U.S. at 396-97, 109 S. Ct. at 1209 (O'Connor, J.; Scalia, J.; Kennedy, J. concurring in part and dissenting in part); see also City of Canton, 489 U.S. at 390 n. 10, 109 S. Ct. at 1205 n. 10.

At the pleading stage of a Section 1983 action a plaintiff must make a "short and plain statement of the essential elements of his claim in his complaint [but] is not required to set out the facts in detail." Batista v. Rodriguez, 702 F.2d 393, 397 (2d Cir. 1983); see also Ricciuti v. New York City Transit Authority, 941 F.2d

119, 123 (2d Cir. 1991).[1] However, what is an adequate "short and plain statement" depends on the case at hand, and the type of claim. With respect to a Monell claim "an allegation of municipal policy or custom would be insufficient if wholly conclusory." Ricciuti v. New York City Transit Authority, 941 F.2d 119, 123 (2d Cir. 1991).

I. Plaintiff's Allegations against the Kings County District Attorney's Office

Plaintiff asserts that the District Attorney's Office failed to instruct Assistant District Attorneys as to "(i) their obligations to recognize and disclose exculpatory information and to avoid the use of perjured evidence; (ii) their obligations otherwise to safeguard and protect the Constitutional rights of accused persons; and (iii) their fundamental duty as prosecutors to avoid unjust convictions (even at the expense of "losing cases.")" Plaintiff also contends that the Office lacked written policies, procedures or manuals regarding these areas. Plaintiff alleges that this deficient training and a lack of supervision of Assistant District Attorneys' handling of exculpatory material resulted in the improper conduct of the prosecutor and consequently the deprivation of plaintiff's constitutional rights.

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[1] However, to survive a motion to dismiss the complaint must "make specific allegations indicating a deprivation of rights." Fonte v. Board of Managers, 848 F.2d 24, 25 (2d Cir. 1988); accord Alfaro Motors, Inc. v. Ward, 814 F.2d 883, 887 (2d Cir. 1987); Barr v. Abrams, 810 F.2d 358, 363 (2d Cir. 1987). In the case at hand the plaintiff has adequately pleaded such a deprivation. The issue is whether his pleading of municipal policy is sufficient to withstand defendant's motion to dismiss.

The Court finds that plaintiff does not allege sufficient facts to establish that the alleged failures to train, supervise, or set out policy reflected the District Attorney's Office's "deliberate indifference" to the rights of New York City residents. The complaint does not allege a pattern of constitutional violations involving the use of perjured testimony or a mishandling of exculpatory materials which could have put the District Attorney's Office on notice regarding a need for this training. A reasonable District Attorney might reasonably assume that lawyers in the course of their legal education and preparation for the bar would learn that prosecutors should not use perjured testimony, and should not hide evidence helpful to the defense or otherwise endeavor to convict innocent persons. Thus, even taking the plaintiff's factual assertions as true, the plaintiff does not establish that the lack of training or supervision reflected the defendant's "deliberate indifference" to the possibility that such lack of training would result in New York residents being deprived of their constitutional rights. The plaintiff's allegations are merely conclusory, and therefore fail to meet the requirements for pleading a Section 1983 claim. See Ricciuti, 941 F.2d at 123; McDonald v. Reid, 1991 WL 51055 (S.D.N.Y 1991).

II. Plaintiff's Allegations against the Police Department

The plaintiff levies similar charges of inadequate training against the Police Department of Kings County. Again he is seeking to show that poor training led to constitutional violations, and that the lack of training rises to the level of a municipal policy. He first accuses the Police Department of having no written policies, procedures or practice guides and giving insufficient training to its

personnel regarding "(i) the proper handling of exculpatory information, and more generally, the protection of Constitutional rights of accused persons; (ii) the proper handling of pretrial statements of prosecution witnesses; and (iii) the basic duty of the police, as an investigative agency, to pursue not only the conviction of the guilty but the exoneration of the innocent."

First, plaintiff's allegation that the Police Department's policies concerning the handling of exculpatory evidence were inadequate is unavailing because it is irrelevant under the facts alleged in the amended complaint. The plaintiff does not claim that the Police Department withheld the exculpatory information from the prosecutor. In fact, the complaint indicates that the Assistant District Attorney was fully aware of the existence and nature of the exculpatory material. A policeman fulfills his Brady obligation by turning over to the prosection any exculpatory information. He does not have an independent duty to reveal this information to the defense. Campbell v. Maine, 632 F. Supp. 111, 121 (D. Me. 1985) ("there is no independent duty of a police officer or investigative officer to disclose exculpatory information to a defendant. . . . The only duty of a police officer in possession of exculpatory information is to turn it over to the prosecutor."), aff'd 787 F.2d 776 (1st Cir. 1986); Hauptmann v. Wilentz, 570 F. Supp. 351, 389 (D.N.J. 1983) ("We are aware of no authority for the proposition that an FBI investigator has an independent duty under Brady to disclose information to defense counsel, or to correct the courtroom testimony offered by other witnesses at trial."), aff'd, 770 F.2d 1070 (3d Cir. 1985), cert. denied, 474 U.S. 1103 (1986). Thus, the plaintiff does not have a cause of action against the City on this basis, since

the police officers fulfilled their obligations by disclosing the exculpatory evidence to the prosecutor.

Plaintiff's second contention regarding the inadequate training of police officers is essentially equivalent to his first. According to the complaint, the police and prosecutor mishandled the pretrial statement of a prosecution witness by failing to divulge exculpatory information relating to it.

Lastly, plaintiff's third assertion also fails to state grounds for a Monell claim. Although this allegation refers to a duty of the police "to pursue not only the conviction of the guilty but the exoneration of the innocent," considering the context of the complaint, plaintiff essentially is arguing that the police should not attempt to convict innocent people.[2] This proposition should be obvious to all without any training.

Plaintiff further alleges that the Police Department's failure to train its employees or have policies, procedures or practice guides regarding "how to respond if confronted by unlawful, unconstitutional or otherwise improper conduct on the part of District Attorney's Office personnel in the course of . . . investigations or

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[2] The plaintiff's most serious charges against the police allege they facilitated the conviction of an innocent man by perjuring themselves. To the extent that plaintiff is arguing that the police should affirmatively act to exonerate the innocent, rather than merely refrain from assisting in convicting innocent people, in the context of this case he must be referring to an alleged duty to reveal exculpatory material. This has already been considered above.

prosecutions" resulted in the breach by police officers of their obligations not to conspire with, or aid and abet District Attorney personnel in the violation of their disclosure duties. Even assuming such an obligation on the part of a police officer, the Court finds that the need for the training described above is far from obvious. The Court perceives no reason, nor does the complaint put forth a reason, for the Police Department to have anticipated improper conduct emanating from the District Attorney's Office. Furthermore, the complaint does not make any specific allegations regarding past misbehavior on the part of the District Attorney's Office which would have put the Police Department on notice of the need to train its employees regarding how to deal with such improper conduct.

For same reasons the Court finds no merit in plaintiff's Monell claim based on the alleged failure of the Police Department to instruct its employees not to perjure themselves and to seek only truthful testimony from non-police witnesses. Any reasonable police officer or lay person would be expected to know this without training.

Thus, as with the District Attorney's Office, even taking the plaintiff's factual assertions as true, the plaintiff does not establish that the alleged lack of training or supervision of police officers reflected the Police Department's "deliberate indifference" to the possibility that such lack of training would result in New York residents being deprived of their constitutional rights.

In view of the foregoing ruling, the Court need not reach the separate issue raised by the City as to whether the City may held liable for the actions of the

District Attorney of Kings County in a 1983 action. The City cites Baez v. Hennessy, 853 F.2d 73 (2d Cir. 1988), cert. denied Baez v. County of Onondaga, 488 U.S. 1014, 109 S. Ct. 805 (1989), in support of its contention that for purposes of Section 1983 liability a county, or in this case a city, cannot be said to be responsible for the conduct of the District Attorney since they cannot control his action and he is fact only responsible to state authorities. On the other hand, plaintiff cites Gentile v. County of Suffolk, 926 F.2d 142 (2d Cir. 1991) in support of their claim that liability may be imposed on a county or city for the malicious prosecution of an individual based on a history of negligent disciplinary practices.

For the foregoing reasons, the complaint is dismissed. Since the complaint has been once amended by plaintiff to meet defendant's Rule 12(b) (6) motion, leave to replead plaintiff's federal claims will not be granted. Therefore, the federal causes of action are dismissed with prejudice. The state claims, however, may be refiled in state court.

SO ORDERED.

Dated: January 7, 1992

JOHN S. MARTIN, JR. U.S.D.J.

Judgment of the United States District Court for the Southern District of New York, Entered January 15, 1992

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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JAMES WALKER,

Plaintiff,

- against -

91 CIVIL 2327 (JSM)

THE CITY OF NEW YORK,

JUDGMENT

Defendant.

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Defendant having moved to dismiss the complaint, and the said motion having come before the Honorable JOHN S. MARTIN, U.S.D.J., and the Court thereafter on January 13, 1992, having rendered its memorandum order and opinion (#69187); granting defendant's motion to dismiss and dismissing the complaint, since the complaint has been once amended by plaintiff to meet defendant's Rule 12(b)(6) motion, leave to replead plaintiff's federal causes of will not be granted, and therefore dismissing the federal causes of action with prejudice, the state claims, however may be refiled in state court, it is,

ORDERED, ADJUDGED AND DECREED: That defendant's motion to dismiss be and it is hereby granted, and it is further,

ORDERED, that the complaint be and it is hereby dismissed, and it is further,

ORDERED, that leave to replead plaintiff's federal claims will not be granted, since the complaint has been once amended by plaintiff to meet defendant's Rule 12(b)(6) motion, and it is further,

ORDERED, that the federal causes of action be and they are hereby dismissed with prejudice, and it is further,

ORDERED, that the state claims may be refiled in state court.

DATED: NEW YORK, NEW YORK
January 15, 1992

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Clerk

STATUTES, RULES, AND CONSTITUTIONAL PROVISIONS

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injury in an action at law, suit in equity, or other proper proceedings for redress.

FED. R. CIV. P. 8

* * *

(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks. Relief in the alternative or of several different types may be demanded.

N.Y. Constit., Art. 13 § 13

* * *

(a) Except in counties in the City of New York and except as authorized in section one of article nine of this constitution, registers in counties having registers shall be chosen by the electors of the respective counties once in every three years and whenever the occurring of vacancies shall require;... The governor may remove any elective sheriff, county clerk, district attorney or register within the term for which he shall have been elected;... In each county a district attorney shall be chosen by the electors once in every three or four years as the legislature shall direct....

* * *

(c) The city of New York is hereby vested with power from time to time to abolish by local law, as defined by the legislature, the office of any county officer within the city other than judges, clerks of counties and district attorneys.... The provisions of article nine shall not prevent the legislature from passing general or special laws prescribing or affecting powers and duties of such city officers or such courts or clerks to whom or which functions of such county officers shall have been so assigned, in so far as such powers or duties embrace subjects not relating to property, affairs or government of such city.

N.Y. COUNTY LAW § 926

* * *

2. There shall continue to be appointed by the governor a district attorney in each of said counties, when a vacancy shall occur in such office, and the person so appointed shall hold office until the last day of December succeeding the first election thereafter at which such vacancy can be filled by election.

N.Y. COUNTY LAW § 930

The district attorney of each county contained within the city of New York is hereby vested with the power to appoint and at pleasure to remove any assistant district attorney attached to his office. All deputy assistant district attorneys shall become and hereafter be known as assistant district attorneys. The number of assistant district attorneys and the salary paid to any assistant district attorney may be increased or decreased by the mayor of the city of New York with the consent of the district attorney.

N.Y. PUBLIC OFFICERS LAW § 2

The term "state officer" includes every officer for whom all the electors of the state are entitled to vote, members of the legislature, justices of the supreme court, regents of the university, and every officer, appointed by one or more state officers, or by the legislature, and authorized to exercise his official functions throughout the entire state, or without limitation to any political subdivision of the state, except United States senators, members of congress, and electors for president and vice-

president of the United States. The term "local officer" includes every other officer who is elected by the electors of a portion only of the state, every officer of a political subdivision or municipal corporation of the state, and every officer limited in the execution of his official functions to a portion only of the state. The office of a state officer is a state office. The office of a local officer is a local office.